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SOME MYTHS OF THE LAW.

“**W**HEN I was a child, I spake as a child, I understood as a child, I thought as a child; but when I became a man, I put away childish things.” These words of the great Apostle to the Gentiles apply to every calling and to every profession under the sun save only that of the law.

The beliefs of men in the childhood of the world have vanished. The gods no longer keep court and revel on high Olympus. The gods and the faiths of Assyria, of Egypt, of Greece and of Rome have long since dissolved into thin air. Even as to the one true religion, the thoughts and understanding of men have undergone a radical change. Three centuries ago in Massachusetts they were burning witches and driving out Roger Williams to become the founder of a new colony. The Inquisition and the massacres in the name of religion throughout Europe, when men were burnt alive, or butchered, for opinion's sake, are recalled today with a shudder. In medicine the practice of Dr. Sangrado is no longer tolerated even in the most benighted regions, and it may be said with truth that so rapid has been the progress in the medical profession that some treatments which thirty years ago were considered orthodox would today invite an indictment for manslaughter or an action for malpractice. In all the other professions, in the sciences and arts, there has been like progress. In the one calling of the law, for which we claim especial ability for the average of its membership, many doctrines remain as they were when patients were bled to death and heretics were burnt.

A short while since we still adhered closely to the common law with its meaningless and cumbersome division of actions into debt, covenant, trover, detinue, assumpsit, and others, whose object seemed to be to prevent the administration of justice instead of to accomplish its speedy enforcement. Then there was, and in some states there is still, the division between law and equity which long since abolished in England and in many states of this country, in others as yet is unaccountably asserted as fundamental. Then there were the many technicalities in criminal trials, and as to the forms of indictment, which seem incredible to reasoning men outside of the legal profession, and until lately we retained the common law by which the status of married women was practically that of a slave. Her legal existence was merged in the control of her husband and the bulk of her property became his by the bare fact of marriage. She had “not a penny, but by his permission.”

But it is needless to go into all the incongruities of the law. The subject is too vast and its anomalies too unbelievable to be recounted. It may be well to consider briefly three of the most striking myths which a hard headed, intellectual profession still cherishes to a greater or less extent, notwithstanding the disappearance of delusions in other callings.

THE COMMON LAW.

There is the "Common Law" which BLACKSTONE so inaptly styled "The perfection of reason." This claim is absolutely without foundation and all progress in the law has consisted in getting away from the barbarous teachings, of the common law. In its origin, and in its continuance, this was merely judge-made law based upon alleged customs or traditions among a barbarous people. Its amendment has come from statutory enactment or from the urgent demands of public opinion arising from greater intelligence among the people. It was in this way that Lord NOTTINGHAM imported the doctrines of equity which is simply the Roman civil law, with some modification, brought in to cure the unbearable evils of the common law system. In the same way, Lord MANSFIELD adapted the common sense of laymen in their dealings in trade and created the "Law Merchant."

As to the criminal side of the docket little more than two centuries ago there were 204 capital offenses. One charged with a felony was not allowed to have counsel to speak for him, nor process to procure his witnesses, nor could he testify in his own behalf, and when as late as 1835 an act was introduced to change this, 13 out of the 15 Judges of England protested against the innovation and one of them threatened to resign if it was enacted. The law was enacted, but the Judge did not resign.

The origin of the common law has been fictitiously claimed to be "as undiscoverable as the sources of the Nile." The sources of the Nile have now long since been discovered and as to the common law we know that its real origin was in the customs of our barbarous and semi-barbarous ancestors, added to by the decisions of Judges of more recent centuries, most of whom were neither wise nor learned beyond their age. One of these, in haste to get to his supper, or half comprehending the cause, or prejudiced, it may be, against a suitor, or possibly boozy (and such have been kenneled) has rendered a decision, another Judge too indifferent, or unable, to think for himself, or oppressed by the magic of a precedent, has followed, other judges have followed each other in turn and thus

many indifferent decisions being interwoven with perhaps a greater number of sound ones, there was built up, piece by piece, precedent by precedent, that fabric of law, that patchwork of many hands, that conception of divers and diverse minds, created at different times, that jumble of absurdities, consistent only in inconsistency, which those who thrived by exploiting its mysteries were wont to style "the perfection of human reason—the Common law of England." As a system, it resembles ORWAY'S Old Woman whose patched gown of many colors bespoke "Variety of wretchedness."

An eminent lawyer, J. C. CARTER, has thus characterized it: "In the old volumes of the common law we find knight service, value and forfeiture of marriage, and ravishment of wards; aids to marry lords' daughters, and make lords' sons knights. We find primer seisin, escuage and monstrans of right; we find feuds and subinfeudations, linking the whole community together in one graduated chain of servile dependence; we find all the strange doctrine of tenures, down to the state of villenage, and even that abject condition treated as a franchise. We find estates held by the blowing of a horn. In short we find a jumble of rude, undigested usages and maxims of successive hordes of semi-savages, who from time to time invaded and prostrated each other. The first of whom were pagans and knew nothing of divine laws, the last of whom came upon English soil when long tyranny and cruel ravages had destroyed every vestige of ancient science and when the Pandects, from whence the truest light has been shed upon English law, lay buried in the earth. When BLACKSTONE, who had a professor's chair and a salary for praising the common law, employs his elegant style to whiten sepulchres and varnish such incongruities, it is like the Knight of La Mancha extolling the beauty and graces of his broad backed mistress, winnowing her wheat or riding upon her ass." The same writer further pertinently asks "When is it that we shall cease to invoke the spirits of departed fools? When is it that in search of a rule for our conduct we shall no longer be bandied from COKE to CROKE, from PLOWDEN to the Year Books, from thence to the Dome Books, from *Ignotum to ignotius*, in the inverse ratio of philosophy and reason; still at the end of every weary excursion arriving at some barren source of pedantry and quibble?"

MAGNA CARTA.

Then there is the myth of Magna Carta. This was a contract (one of many) between King JOHN on one side and 13 barons and 12 bishops on the other, 700 years ago—lacking one year. Its whole

object was to restrict the power of a worthless and irresponsible King in favor of the feudal privileges of the bishops and barons. There was no thought of any protection to others.

The much vaunted doctrine that trial by jury was provided for in Magna Carta is without the slightest foundation in fact. There was no grand jury till about 40 years before when it was established by the Assises of Clarendon in 1176, and there was no such thing as a trial by jury for nearly 150 years, i. e., about 1350 and at first the juries were composed of the witnesses to the crime. Yet even as good an authority as should be the Supreme Court of the United States, without scrutiny of the historical evidence, on one occasion actually held that we owe trial by jury to Magna Carta. What the barons really stipulated for was special privileges for themselves. They bargained that if the King had any cause of complaint against *them*, they should not be tried by his judges, like the common people, but that they should be tried "*per judicium parium suorum*"—that is they were stipulating for a special privilege for themselves, and in derogation of the doctrine of "equality before the law and equal rights for all"—if such doctrine had existed at that time. The agreement was that as to themselves they should be tried "*per judicium*" by the judgment (not by a jury) which should be rendered by men of their own order and not by the Judges of the King, the judges not being their peers or equals but of inferior rank.

Sir Frederic POLLOCK, one of the most accomplished lawyers in England visited this country a few years ago and made many friends. In the well known work by POLLOCK & MAITLAND, "HISTORY OF THE ENGLISH LAW" it is said, "Even in the most famous words of the charter we may detect a feudal claim which will only cease to be dangerous when in the course of time men have distorted their meaning—a man was entitled to the judgment of his peers; the king's justices are no peers for earls or barons * * * in after days it became possible for men to worship the words '*nisi per legale judicium parium suorum vel per legem terrae*' * * * because it became possible to misunderstand them."

McKECHNIE on Magna Carta says "The clause was, after all allowance has been made, a reactionary one, tending to the restoration of feudal privileges and feudal jurisdictions, inimical alike to the Crown and to the growth of really popular liberties." Professor McILWAINE in a very illuminating article on "Due Process of Law in Magna Carta" in the Columbia Law Review, Jan., 1914, has discussed the subject so fully, with citation of all the best authorities, that it is impossible to add to it. He well says that Magna Carta

is now regarded by eminent historians "not as a document of popular liberty but rather as one of feudal reaction. They consider it a concession to the demands of the barons for a return to the feudal anarchy of STEPHEN'S time and a repeal of the great administrative measures by which HENRY II and his predecessors were molding a national judicial system and thus preparing the way for a common law."

These authorities further demonstrate that the words "*nullus liber homo*" referred to those who held by military or Knight service—that is Earls, Barons, Knights, and others who held knight's fees."

As to the other words *lex terrae*, i. e., "law of the land" of which we have heard so much at the hands of courts which are bent upon setting up their own economic views to destroy or nullify progressive legislation in the interest of the masses, the phrase meant merely "the former law" of feudal tenures which had prevailed during the feudal anarchy in STEPHEN'S time, and the feudal barons demanded thereby a repeal of the measures by which HENRY II was preparing a national judicial system. This "*lex terrae*" was trial by wager of battle, compurgation and ordeal. How some later courts have misconstrued its meaning!

But even if Magna Carta had in it the meaning which has been read into it by judges in later times in violation of all historical authority, it was at most a restriction upon the power of the king. By no sort of logic could it therefore be used, as some courts have used it, as a restriction upon the people of this day, speaking through their agents in the legislature and in Congress, in the enactment of laws for the betterment of the masses.

THE JUDICIAL VETO.

A third myth is that the courts have the power to set aside an act of Congress, or of a state legislature, as unconstitutional. Such power was unknown in England and has been unknown in all other countries, most of which now have written constitutions. Whether an act is constitutional or not is a matter for the legislative body which passes it. They are the direct agents of the people and always have in their ranks more intelligence than the highest court of the State or nation, for the reason that the legislative bodies are far more numerous. The legislators, whether in the State legislature or in Congress, have not only an aggregate intelligence greater than that of the court that assumes to nullify their action but they are equally sworn to obey the Constitution and are as patriotic as the judges. Should the legislature or Congress disobey the mandate of the Constitution the power to review and nullify

their action has not been given by the Constitution to any court but rests in the sovereign—the people themselves—in electing a new law making body. The Federal Constitution, and most of the State Constitutions, give the executive a veto not absolute, but qualified, by vesting authority in the lawmaking body to overrule it.

It is inconceivable that the veto power should have been given the judiciary, when it had never existed elsewhere, without any word or line intimating the conferring such judicial veto and with no provision for its being overruled as in the case of the executive veto.

This power was first assumed by the Supreme Court of the United States in an *obiter* opinion in *Marbury v. Madison* in 1803. If it had required the execution of any mandate the court knew that Mr. JEFFERSON would have disregarded it, as JACKSON did later when the act of a state legislature and not of Congress, was held unconstitutional in the matter of the Yazoo claims. We know, too, that if the judges in that case had set aside an act of Congress they would at once have been impeached, but as the court very shrewdly held, while setting forth the power of the court to hold an act of Congress unconstitutional, that it could not issue the mandamus which the plaintiff asked, there was nothing upon which an impeachment would lie. The court did not venture to hold any other act of Congress unconstitutional for 54 years and then in the *Dred Scott* case in 1857, which was a *brutum fulmen*.

There is not a line in the Federal Constitution, nor in the State constitution, to authorize the assumption of such power by the courts. It has no validity apart from the acquiescence or toleration which has been accorded it. The provision in the Federal Constitution that the United States Constitution and laws passed in pursuance thereof shall be supreme does not authorize the setting aside of an act of Congress, but at most asserts the supremacy of the Federal authority and that an Act under it is to be preferred to a state statute just as a later statute controls a former one.

Nothing can be more dangerous than to assume that the law-making authority in this country does not rest with the representatives of the people subject to review by the people alone at the next election but that the majority of a board of five, or of nine, lawyers can nullify at will the power of the people. Such doctrine amounts simply to asserting that great combinations of capital by securing the nomination or the appointment of a majority of lawyers on the highest court can control the public policy of the government.

It is not necessary to quote the stringent denunciation of such usurpation by JEFFERSON, by JACKSON, by LINCOLN, and hundreds of others. It is sufficient to point to the fact that in five great states

the people have been forced to deny such doctrine and to assert their ultimate sovereignty by the adoption of a constitutional provision for the "recall of the judges," that this provision has been adopted in another state where it has been set aside by the court itself on a technicality, and that it has been passed by legislatures in several other states in which its adoption is now pending a popular election. Then there is the remedy advocated by Mr. ROOSEVELT, in the platform of one of the great parties, demanding a "recall of judicial decisions" on constitutional questions. This is less objectionable to most lawyers, because it is simply the application to those decisions which shall set aside acts of the legislature as unconstitutional, of the method by which executive vetoes are overruled.

Then there is the remedy provided by the new constitution of Ohio which forbids their supreme court to set aside any act of the legislature as unconstitutional if more than one judge dissents. There are other remedies which have been suggested, but which need not now be discussed.

Suffice it to say that the true basis of our government is that the people are capable of self government, and that their will, fairly ascertained, shall control. We have never given to the judges the "judicial veto" power. It has been assumed, but it can not be maintained. It makes of the courts small legislative bodies which may be appointed, or nominated, by the special interests. The question then is squarely presented which shall control—the "interests" or the body of the people? One must know little of the temper of the American people if he believes that this myth can long survive the fierce light that is being shed upon it.

The demand for reform in legal procedure and of the abuses incident to our practice is insistent. It must be heeded. Their importance, however, is small compared with the necessity of abandoning the usurped power by which the courts have become legislative bodies, able and anxious too often to thwart the will of the people as to their public policies when this has been declared by them at the polls in selecting their duly constituted agents for making their laws.

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